Supreme Court of the United States.

APPEAL FROM

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

EDWARD S. THOMAS, AS TRUSTEE IN BANKRUPTCY OF CHARLES I. LIGHTSTONE, BANKRUPT,
Appellant,
against
SOLOMON M. SUGARMAN,
Appellee.

No. 131.
October Term,
1909.

REPLY BRIEF FOR APPELLANT.

WM. SIEGRIST, LAW PRINTER, 148-149 WORTH ST., NEW YORK

Supreme Court of the United States.

EDWARD S. THOMAS, as Trustee in Bankruptcy of Charles I. Lightstone, Bankrupt,
Appellant,

against

SOL. M. SUGERMAN,
Appellee.

Appellant's Reply Brief. October Term, 1909. No. 131.

The Appeal Was Properly Taken.

By the amendment of February 5th, 1903 (32 Stat., 797, C-487) there was added to subdivision (*e*) of Section 67 of the Bankrupt Act which provided for the setting aside of fraudulent conveyances and the recovery of property by suit of a trustee the words :

> "For the purposes of such recovery any Court of bankruptcy as hereinbefore defined, and any State Courts which may have had jurisdiction if bankruptcy had not intervened shall have concurrent jurisdiction."

By this section the District Court took jurisdiction of the case at bar.

Prior to the amendment of 1903 such a suit in equity could not have been brought in the District Court except by the consent of the defendant.

Bardes vs. *Hawarden Bank* (*178 U. S., 528*).

The effect of the amendment was merely to add another type of case to those governed by the Judiciary Act.

Jurisdiction having been first properly obtained this equity action is subject to the same rules regarding procedure and appeal as any other equity action, viz.:

Section 6, Chap. 8 (A) of the Judiciary Act (Act of March 3rd, 1891, Chap. 517, §6, 26 Stat., 828), which provides:

> "That the Circuit Courts of Appeal established by this Act shall exercise appellate jurisdiction * * * and the judgments or decrees of the Circuit Courts of Appeal shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, under the Revenue Laws and under the criminal laws, and in Admiralty cases. * * *
>
> In all cases not hereinbefore in this section made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed."

The case is not one in which the decision of the Circuit Court of Appeals is made final either because of the facts upon which jurisdiction depends or the nature of the case.

The appeal is allowed by this section, and is not prohibited by any provision of the Bankruptcy Act.

Section 24 of the Bankruptcy Act provides that:

> "The Supreme Court of the United States, the Circuit Courts of Appeal of the United States, and the Supreme Courts of the Territories, in vacation in chambers and during their respective terms, as now or they may be hereafter held are hereby invested with Appellate Jurisdiction *of controversies arising in bankruptcy proceedings* from the Courts of bankruptcy from which they have appellate jurisdiction in other cases."

This section has nothing to do with appeals from the Circuit Court of Appeals to the Supreme Court in equity cases. It simply confers jurisdiction "of controversies arising in bankruptcy proceedings."

The case at bar is not a controversy arising in a bankruptcy proceeding. It is a suit in equity in which one party happens to be a trustee in bankruptcy.

In Hewit vs *Berlin Machine Works* (*194 U. S., 296*), a Trustee in Bankruptcy applied to the District Court for leave to sell certain property. The Berlin Machine Works filed a petition praying that it be declared the owner of the property or that it be declared entitled to be first paid out of the proceeds of the sale of the property. The District Court reviewed the referee's decision, and the trustee then filed a petition in the District Court applying for revision and review, and also appealed to the Circuit Court of Appeals. The District Court at the same time ordering "that a superintendency and revision and review in matter of law and an appeal be and the same hereby is allowed in the above-entitled proceedings to the Circuit Court of Appeals."

Mr. Chief Justice FULLER, said (*at p. 299*):

> "If the trustee had carried the case to

the Circuit Court of Appeals on petition for supervision and revision under §24 *b* of the Bankruptcy Law (30 Stat. at L., 533, Chap. 541, U. S. Comp. Stat., 1901, p. 2432), the case would have fallen within *Holden* vs. *Stratton* (*191 U. S., 115*), *ante 116; 24, Sup. Ct. Rep., 45*, and the appeal to this Court would have failed. But he took it there by appeal, though accompanied by some apparent effort to avail himself also of the other method. And as the Berlin Machine Works asserted title to the property in the possession of the trustee by an intervention raising a distinct and separable issue, the controversy may be treated as one of those 'controversies arising in bankruptcy proceedings' over which the Circuit Court of Appeals could, under §24*a*, exercise appellate jurisdiction as in other cases. §25*a* relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required (*Holden* vs. *Stratton*, *191 U. S., 115, ante 116; 24 Sup. Ct. Rep., 45*), while §24*a* relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction vested in them at law and in equity by §2 to settle the estates of bankrupts, and to determine controversies in relation thereto (*Hutchinson* vs. *Otis, 190 U. S., 552; 47 L. Ed., 1179; 23 Sup. Ct. Rep., 778; Burleigh* vs. *Foreman, 125 Fed., 217*).

The appeal to this Court then followed, under § 6 of the Act of March 3, 1891 (26 Stat. at L., 828, Chap. 517, U. S. Comp. Stat., 1901, pp. 549, 550)."

As stated in the opinion "§25*a* relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respects of which special provision therefor was required." §25*a* provides that:

"Appeals, as in equity cases, may be

taken *in bankruptcy proceedings* from the Courts of Bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the Territories, in the following cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered and may be heard and determined by the Appellate Court in term or vacation as the case may be.

(*b*) From any final decision of a Court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

(1) Where the amount in controversy exceeds the sum of two thousand dollars and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or,

(2) Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States."

The case at bar is not an appeal in a bankruptcy proceeding or in any step of a bankruptcy proceeding. It has no connection with bankruptcy proceedings except the fact that the plaintiff is a trustee in bankruptcy.

General Order No. 36 has no application to the case at bar; it provides (§ 2):

"2. Appeals *under the act* to the Supreme

> Court of the United States from a circuit court of appeals or from the Supreme Court of a territory, or from the Supreme Court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.
>
> 3. In every case in which either party entitled by the act to take an appeal to the Supreme Court of the United States, the Court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts and the conclusions of law."

The words "under the Act" limit the application of this general order to such appeals as are provided for in Section 25*a*, in which category the case at bar is not included.

Appellee's contention seems to be that this general order limits the right of appeal granted by the judiciary act. It was, of course, never intended that the general order issued pursuant to the limited authority of Section 30 should be construed to limit a right of appeal which has been expressly determined by statute.

The Act itself distinguishes suits between a trustee and third parties from proceedings in bankruptcy by § 23 and § 23 (*b*) provides that :

> "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought

> or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under section sixty, subdivision b and section sixty-seven, subdivision e.*"

This seems to be a declaration that suits brought by a trustee under Section 60, subdivision *b* and Section sixty-seven, subdivision *e* need present none of the other requisites of federal jurisdiction.

Appellee refers to *Richardson* vs. *Shaw* (*209 U. S., 365*) as being an action like the present and states that it was brought to set aside an alleged fraudulent conveyance made by the bankrupt. This is incorrect. *Richardson* vs. *Shaw* was an action at law brought by a trustee in bankruptcy to recover preferences.

If a trustee has a year in which to apply for a writ of certiorari, appellee's argument that it was intended that he should have only thirty days to appeal from a decree in equity is hardly defensible.

The nature and manner of this appeal was brought up before the United States Circuit Court of Appeals in this case upon argument and briefs. The Circuit Court of Appeals was asked to make separate findings of fact and conclusions of law as provided by general order No. 36, § 3, if the appeal was pursuant to that order. It was held that this was an equity appeal governed by § 6, Chap. 8 (*a*) of the Judiciary Act.

To summarize: This is an equity case of which the District Court had jurisdiction by the amendment of 1903 to Section 67 (*e*) of the Bankruptcy Act. Being an equity case it was subject to the rules affecting all other equity cases, and the rights of appeal are the same as in all other equity cases, and the mere fact that the orig-

inal jurisdiction was conferred by an amendment to the Bankruptcy Act does not affect the subsequent treatment of the case as an equity case.

The case is not included within the list of cases specified in Section 6 where the right to appeal does not exist. That section is to be construed as it stands and Congress had the right by the amendment of 1903 to increase the equity jurisdiction in the federal courts so as to include such cases as that at bar.

The case then comes up on appeal precisely as if it involved the constitution or presented any other feature which entitled it to federal jurisdiction, and so long as the decision of the Circuit Court of Appeals is not made final by §6, the right to appeal under that section exists.

Respectfully submitted,

JAMES, SCHELL & ELKUS,
Attorneys for Appellant.
Office and P. O. Address,
170 Broadway,
Borough of Manhattan,
City and State of New York.

ABRAM I. ELKUS,
CARLISLE J. GLEASON,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1920. No. 131.

EDWARD S. THOMAS, as Trustee in Bankruptcy of CHARLES I. LIGHTSTONE, Bankrupt,

Appellant,

vs.

SOL M. SUGERMAN,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR APPELLEE.

JOHN J. CRAWFORD,
Counsel for Appellee.

E. M. STERRY, PRINTER, 302-4 FULTON STREET, NEW YORK.

Supreme Court of the United States.

EDWARD S. THOMAS, as Trustee in Bankruptcy of Charles I. Lightstone, Bankrupt,
Appellant,

against

SOL M. SUGERMAN,
Appellee.

October Term, 1909.
No. 131.

BRIEF FOR APPELLEE.

Statement.

This is an appeal by the complainant from a decree of the Circuit Court of Appeals for the Second Circuit affirming a decree of the District Court for the Southern District of New York, which sustained a plea in bar interposed by the defendant Sugerman to the bill of complaint.

The action was brought by the appellant to set aside an alleged fraudulent transfer made by the bankrupt to the defendant. The property transferred consisted of outstanding accounts amounting to $47,197.61, for which the bankrupt received from the defendant $30,000. in cash (fols. 3-4). The appellee, by his plea in bar, set up as a defense that the appellant, with full knowledge of the facts, had prosecuted to judgment a proceed-

ing against the bankrupt requiring him to account for the proceeds of the transfer (fol. 19); and in passing upon the sufficiency of the plea, the District Court, by consent of the parties, considered the record in a proceeding to require the bankrupt to pay over to the trustee certain moneys alleged not to have been accounted for (fols. 47; 20-44).

In his petition in that proceeding, the trustee alleged, among other things, that in August, 1904, the bankrupt began cashing his outstanding accounts and from that source received $30,000, and that among the moneys which came into the hands of the bankrupt there was $30,000 received from the appellee (fols. 24, 26). And in alleging the amount of assets concealed by the bankrupt, the trustee included this $30,000 (fols. 26, 27). Upon the hearing before the referee, this money was considered as a part of the bankrupt's estate, and he was charged with the receipt of that sum (fols. 39, 39). The total for which he was required to account was $54,209, in which sum the $30,000 was included (*Id.*). Against this he was credited with $36,709, on account of various expenditures, and was ordered to pay over to the trustee, the balance, $17,500 (fols. 42, 43, 96). Upon the bankrupt's application to review the order of the referee, the trustee opposed the motion to reverse, and the order was affirmed (fol. 44).

Upon the facts so disclosed, the District Court sustained the plea (fols. 46-48), and this decree was afterwards affirmed by the Circuit Court of Appeals (fol. 65).

I.

The appeal should be dismissed because not taken in due time.

The record in this case discloses that the decree of the Circuit Court of Appeals from which this appeal is taken was filed and entered on the 18th of November, 1907 (fol. 66), and that the appeal was taken on the 17th of March, 1908 (fols. 69-70). If, therefore, the case is one to which General Order No. 36 applies, the appeal was too late, and should be dismissed (Conboy *v.* National Bank, 203 U. S. 141).

The language of that order is "Appeals *under the Act* to the Supreme Court of the United States from a Circuit Court of Appeals * * * shall be taken within thirty days after the judgment or decree." Now, what is an "appeal under the Act?" Does the term include only appeals taken in "bankruptcy proceedings" under Section 25 of the Act, or does it apply as well to appeals in "controversies arising in bankruptcy proceedings." where the jurisdiction depends upon Section 24.

The phrase "appeals under the act" is broad and comprehensive, and fairly and reasonably construed, would include an appeal taken in pursuance of any provision of the Bankruptcy Law. If the court had intended its rule to embrace only "bankruptcy proceedings" would it not have used words more significant of that intent? Would it not have said, "Appeals in bankruptcy proceedings," or "appeals under Section 25 of the Act"? If this was all that it had in mind, why did the court use such general terms? Moreover, the phrase "under the act" is substantially the same as that which the Court has so often construed,

as, for example, "cases arising under the laws of the United States," or "cases arising under the patent laws," or "under the criminal laws," etc., and it is fair to suppose that in formulating General Order No. 36, the court used the words in the comprehensive sense in which it has so frequently held that similar words were used by Congress. And there can be no reason for not giving to them their natural and ordinary import, unless it can be shown that the Act itself requires that they should be limited.

Section 24 of the Act provides that "The Supreme Court of the United States, the Circuit Courts of Appeals of the United States, and the Supreme Court of the Territories * * * are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases." But this bare grant of jurisdiction does not necessarily imply that the mode of procedure is to be that prescribed by the Act of 1891. If this had been the intention of Congress, would it not have said so? Would it not have used such words as "in the mode prescribed in other cases" or words of similar import? It is hardly probable that a matter so important as this would have been left to implication, when the legislative intent—if such had been that intent—could have been made clear by a half-dozen words. But the reason for the omission becomes obvious when we look at the context. Under the same Chapter heading—"Courts and Procedure Therein"—we find another section which declares that "all necessary rules, forms and orders *as to procedure* and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States" (Sec. 30). Is

it not the reasonable, indeed the necessary, inference from this that Congress intended that the procedure under section 24 should be prescribed by this Court? Construing the two sections together, it seems to be plain that Congress meant to do no more than confer the jurisdiction, and left the whole question of procedure, including the mode and time for taking appeals, to be regulated by this Court.

A comparison of the language used in section 24 with that used in section 25 will make it further manifest that this was the legislative intent. The section heading of section 24 is "Jurisdiction of Appellate Courts," while the heading of section 25 is "Appeals and Writs of Error." In the latter section, the mode of taking appeals is prescribed and regulated, from which it is apparent that the question of procedure was one which Congress considered. Why then is the language of the two sections so entirely different? If Congress meant in section 24 to prescribe the mode of procedure, why did it content itself with merely vesting jurisdiction? Why did it not follow the form used in section 25, and say: "Appeals may be taken in controversies arising in bankruptcy proceedings from the courts of bankruptcy to the Supreme Court of the United States and the Circuit Court of Appeals from which they have jurisdiction in other cases, and in the same manner," or use words of similar import? No explanation of this radical difference in phraseology seems reasonable, except the obvious one, that the whole subject of procedure under section 24 was to be provided for in the manner prescribed in section 30, viz. the rules and orders of this Court.

Moreover, to encourage appeals to this court in this class of cases by allowing a year in which to take them would not only operate to defeat one of

the objects of the Bankruptcy Act—expedition in the settlement of bankrupt estates—but it would be obnoxious to the spirit and policy of the Act of 1891. The primary purpose of the last mentioned act was to relieve this court, and to that end, the act excludes appeals as of right in the vast majority of cases. Even in the most important cases arising under the admiralty, patent, revenue and criminal laws, no such appeal is allowed. Now, with all this in mind, when the Bankruptcy Law was enacted, could Congress have intended to encourage appeals to this Court in trifling cases, merely because they happened to be "controversies in bankruptcy?" Before we impute such an intent, we should have better evidence of it than inferences and conjectures—something more tangible than mere implication.

The construction for which the appellee contends does no violence to the language of the act, and is not forced or strained; but gives to every word used by Congress its fair and ordinary import. Besides, it was a most natural and obvious thing for Congress to vest in this court the power to fix the time for taking appeals in all cases arising under the Bankruptcy Act. Many considerations of policy and convenience require that this should be so—not only to secure expedition in the settlement of bankrupt estates—but to protect the appellate courts from being over-burdened with business of this sort. To allow a year in which to appeal is certainly to encourage appeals, if for no other purpose than to secure delay. But why should it be supposed that Congress meant to encourage appeals in this class of cases, and especially appeals to this Court? If the present suit had been commenced in the State Court, it could not have been carried to the highest court

of the State, except by permission, or unless the judges of the intermediate appellate court should have disagreed. (New York Code of Civil Procedure Sec. 191; Frank *v.* Volkommer, 205 U. S., 521.) When the legislature of New York sought to relieve the Court of Appeals of that State from a condition similar to that which prevailed here when the Circuit Court of Appeals was established, it provided that in a certain class of cases the unanimous decision of the intermediate appellate court should be final, and in that class was included actions to set aside alleged fraudulent transfers. The reason is plain. Such cases rarely involve any new or difficult questions of law, and in nearly all of them the important question is one of fact. But if, as a class, they are not of sufficient importance to be appealable as of right to the highest court of a State, why should the time of this court be occupied with them? Yet if this appeal can be entertained, there is no reason why any trustee in bankruptcy may not appeal to this court whenever he can show that the suit is to set aside an alleged fraudulent transfer, that it involves more than one thousand dollars, that it was instituted in the United States District Court, and that an appeal from the judgment of the circuit court of appeals was taken within one year. With this case as a precedent, there can be little doubt but that the docket of this court would soon be clogged with such appeals. Can it be possible that Congress meant that trumpery cases, involving nothing more than the efforts of petty tradesmen to defeat the claims of their creditors, should be brought here with the same freedom as cases requiring a construction of the constitution? And is it conceivable that Congress could have intended to impose upon this court such a vast load

of trifling business, without any power in the court even to fix the time within which such appeals must be taken?

The courts have often said that one of the objects sought to be accomplished by the Bankruptcy Act was expedition in the settlement of bankrupt estates. But would it not greatly tend to defeat that object, if the times allowed for taking appeals like the present were the times mentioned in the Act of 1891? The defeated party might delay his appeal to the Circuit Court of Appeals for six months, and, after the case has been decided there, might wait a whole year before appealing to this court. Such procedure would, in most, if not in all, cases, be much less expeditious than the procedure in the State courts. If the present suit had been brought in the State court, the appeal to the Appellate Division must have been taken within thirty days, and, unless the judges of that court should have disagreed, there would have been no further appeal as of right (New York Code Civil Procedure, § 191; Frank *v.* Volkommer, 205 U. S. 521). Is it likely that Congress, when it vested the courts of bankruptcy with jurisdiction in this class of cases, meant to establish a mode of procedure so much more dilatory than that in the State courts? Before any such an intent is imputed, the court should have shown to it some provision in the act which, either expressly or by unavoidable implication, declares that the times for taking such appeals are those specified in the Act of 1891. But no such declaration can be found anywhere in the act, and this omission, coupled with the express power conferred upon this court to prescribe rules of procedure, would seem to require, not this implication, but the very opposite.

By Section 25 of the Act it is provided that

an appeal to the Circuit Court of Appeals from a judgment allowing or rejecting a debt or claim must be taken within ten days after the judgment appealed from has been rendered. But the pendency of a controversy arising in a bankruptcy proceeding may impede the settlement of the bankrupt's estate quite as effectually as the allowance or rejection of a claim. Why, then, should Congress have required appeals of the latter class to be taken in ten days and allow six months for those of the other sort? Why should such great haste be exacted in the one case and such dilatoriness permitted in the other? No good reason can be found for any such distinction, and if it existed, we could impute it to nothing better than oversight. But why import into the statute something that is not there when it is so obviously at variance with what is there? Why read into the act something that Congress has deliberately omitted, when the effect would be to make the enactment inconsistent and contradictory?

Nor is there anything in the decisions of this Court to warrant the construction contended for by the appellant. In *Hewitt* v. *Berlin Machine Works* (194 U. S. 296), the only question was one of jurisdiction, and the question whether General Order No. 36 applied was not involved or discussed. *Richardson* v. *Shaw* (209 U. S. 365) was in all respects an action like the present, viz., an action brought in the United States District Court by a trustee in bankruptcy to set aside an alleged fraudulent conveyance made by the bankrupt. The judgment of the District Court was, as in the case at bar, in favor of the defendant, and upon appeal by the trustee to the Circuit Court of Appeals this judgment was affirmed. The judgment of the Circuit Court of Appeals was entered in July, 1906, and in the following October

application was made to this court for a writ of *certiorari*, which was granted. But if an appeal or writ of error lay as a matter of right in that case, and the trustee had still nine months in which to perfect it, why was it necessary for the court to issue a *certiorari*? If such a right existed, then the action of the court in that case was supererogatory—a thing we cannot impute to this Court. But the facts of the two cases are identical, and if a writ of *certiorari* was the proper procedure there, then it was required here.

Doubtless, there may be, suits brought by trustees in bankruptcy, which will not be governed by the General Orders in Bankruptcy. If the trustee can show that the case is one within the judiciary acts, and not dependent at all upon the Bankruptcy Law, then he may rest his right of appeal solely upon the Act of 1891, and claim that an appeal taken within the time fixed by that Act is in good season. But that is because he can find the grant of jurisdiction outside of the Bankruptcy Act. If he is compelled to invoke that Act to support the jurisdiction, then his appeal is "under the Act," and regulated by such rules of procedure as this court may prescribe.

Now, upon what ground can the appellant in this case sustain the jurisdiction of this Court and the District Court? Certainly not upon anything to be found in the Acts relating to the judiciary. For what is the nature of the controversy? A suit to set aside a transfer alleged to have been made in fraud of creditors. And who are the parties? Persons who are citizens of the same State. How, then, is it brought within the jurisdiction of the Federal courts, and particularly, how could the District Court take jurisdiction? Why, merely because it is a case arising under the Bank-

ruptcy Law. Except for this fact, the Federal courts would be wholly without jurisdiction. In that Act, and in that Act alone, must be found the authority for every step taken in the suit. The mode of procedure, then, is not that mentioned in the Act of 1891, but that prescribed by the Bankruptcy Act itself, viz., the rules adopted by this Court in pursuance of the express authority to prescribe "all necessary rules as to procedure."

II.

In seeking to recover the proceeds of sale as a part of the bankrupt's estate, the complainant necessarily affirmed the sale, and hence he may not now proceed upon the theory that the sale was void.

The question of election was fully considered by this Court in *Robb* v. *Vos* (155 U. S., 13). In the opinion in that case the Court quoted with approval from *Connihan* v. *Thompson* (11 Mass., 270, 272, as follows: "The defence of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmance and the other upon the disaffirmance of a voidable contract or sale of property. In such cases, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties, once for all. The institution of a suit is such a decisive act; and if its maintenance necessarily involves an election, to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive

waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon." The Court also cited with approval the case of *Butler* v. *Hildreth* (5 Met., 49). In that case the assignee of an insolvent debtor had commenced an action against the vendee on a note given by him for the price of the goods sold. Afterwards, the assignee discontinued the action, and brought an action of trover alleging that the transfer was fraudulent. Chief Justice Shaw said: "We assume, for the purpose of this inquiry, that he had the right, in behalf of creditors, to set aside this conveyance, if in fact it was made to defraud creditors. But such a conveyance is not *ipso facto* void; it is valid as between the parties; it is binding upon the purchaser, and he could not avoid the payment of his notes on that account. It can be avoided only by the creditors, or one representing creditors. But circumstances may be such, that it may not be for his interest to avoid such sale, but on the contrary to affirm it. Suppose the fraudulent character of the transaction consisted in this, that the debtor intended to sell his goods, and the purchaser to buy them for the express purpose of preventing an immediate attachment, by substituting for goods open to attachment, promissory notes not capable of attachment. Should these notes afterwards come into the hands of an assignee, it might be more beneficial for the creditors, to collect the notes, which would affirm the sale, than to disaffirm the sale and repudiate the notes. The assignee has an *election,* not of remedies merely, but of rights. But an assertion of one is necessarily a renunciation of the other."

In *Sickman* v. *Abernathy* (14 Colo., 174) the members of an insolvent firm transferred all their assets for the sum of $15,000, and took in payment three notes of the pur-

chasers for $5,000 each. Certain creditors then commenced proceedings against the firm for goods sold, and the vendees were served as garnishees. It was held that these creditors could not afterwards claim that the sale was fraudulent as to them. The Court said: "At the time of the sale and transfer of the assets of the defendants to the garnishees, the attendant circumstances and relation of some of the parties were such, perhaps, as to raise a doubt in regard to the honesty of the transaction sufficient to have caused an investigation by the creditors, which might have been had under proper proceedings; and, if found fraudulent, the sale could have been set aside, and the entire property in the hands of Sickman & Davy, subjected to the payment of the debts, or, if found best, the sale could have been affirmed, and provision made for the application of the entire proceeds to the payment of the debts. But no such course was taken. The creditors, instead of questioning the honesty of the sale, acquiesced, treated it as legitimate, and elected to proceed against the purchasers for money supposed to be due. By the course pursued, the sale and transfer of the assets of the firm to the garnishees was ratified."

Hathaway v. *Brown* (22 Minn., 214) was an action for the wrongful taking and conversion of a stock of goods, sold by one Mills to the plaintiff, and taken from the latter's possession by the defendant Brown, as sheriff, by virtue of executions against Mills in favor of the other defendants. The defense interposed was that the sale to plaintiff was in fraud of the creditors of Mills. At the trial, the plaintiff introduced evidence tending to prove that, in part payment for the goods in question, he had conveyed to Mills certain

real estate, and that some of the defendants, with knowledge of the fact and of the circumstances attending the sale, had caused the land so conveyed to be levied on and sold under their execution against Mills. Held, that the defense was good. The Court said: "Conceding the fraudulent character of the sale as to the creditors of Mills, it was voidable, but not absolutely void. It was competent for them to elect either to avoid it *or to affirm it by pursuing the property which their debtor acquired in exchange for that which he sold. They could not do both.*"

So, in *Millington v. Hilt* (47 Ark. 301), it was said: "When any creditor with knowledge of the wrong that has been done him, makes his election to take from the grantee the purchase price agreed to be paid for the land, his conduct is, in effect, an affirmance of the sale and a waiver of the right to complain of the fraud."

See also

Iron Gate Bank *v.* Brady, 184 U. S. 665.

W. W. Brice Ltd. *v.* Hutchins, 205 U. S. 340.

Furness *v.* Ewing, 2 Pa. St. 479.

Cunningham *v.* Campbell, 3 Tenn. Ch. 708.

Butler *v.* O'Brien, 5 Ala. 316.

Lemay *v.* Bibean, 2 Minn. 251.

Fowler *v.* Bowery Savings Bank, 113 N. Y. 450.

Reunich *v.* Bank of Chillicothe, 8 Ohio, 529.

Scarf *v.* Jardine, L. R. 7 App. Cas. 345.

It is also well settled that the election is de-

termined by the commencement of the proceeding, and not by the result.

Robb *v.* Vos, 115 U. S. 13.
Matter of Garver, 176 N. Y. 386.
Lowenstein *v.* Glass, 48 La., Ann. 1422.
Smith *v.* Gilmore, 8 App. Cas. (D. C.) 192.
Thensen *v.* Bryan, 113 Iowa, 496.
Sherman *v.* Watt, 104 Mich., 201.
Ludington *v.* Patton, 111 Wis., 208.

Now, how do these rules apply to the present case? When the appellant entered upon his duties as trustee, he learned that the bankrupt had transferred to the defendant certain accounts, and had received from the defendant $30,000 in cash. The appellant then had the right to do one of two things; he could treat the sale as void, and claim the accounts as a part of the bankrupt's estate, or he could affirm the sale and claim the proceeds. But, obviously, the accounts and the money paid for them could not both belong to the estate. Which should it be? This was for the appellant to decide, and he had to make a choice.

And did he not make a choice? He took a proceeding for the purpose of compelling the bankrupt to turn over certain assets belonging to the estate, and which he alleged the bankrupt was concealing. And in his petition in that proceeding he set forth that the accounts had been transferred to the appellee; that the bankrupt had received $30,000. therefor; *that this was a part of the bankrupt's estate,* and was wrongfully withheld by the bankrupt; and he procured a judgment in which this money *was included in the estate for which the bankrupt was required to ac-*

count. That the proceeds of sale constituted a part of the estate was the gist of the proceeding and the essence of the decision. The finding of the referee is: "In August, 190[illegible], he [the bankrupt] received on outstanding accounts the sum of $30,000." (fol. 38) and all through the proceeding this money was treated as a part of the estate for which the bankrupt must account, and in arriving at the amount which the bankrupt was found to be concealing, this money was placed among the debits. Moreover, the total amount charged against the bankrupt, including this $30,000., was $54,209, while he was allowed $36,709, which he claimed to have paid out, and the total he was found to be concealing was only $17,500, so that except for the sum received from the appellee the decision must have been in the bankrupt's favor. Now, as the trustee brought this proceeding and procured this decision, with full knowledge of the facts—for this is the allegation of the plea—why does it not amount to an election? Is it not wholly inconsistent with an intent to do otherwise than affirm the sale?

One of the tests applied in cases of election is whether the two actions could be prosecuted at the same time (Fowler *v.* Bowery Savings Bank, 113 N. Y. 450, 454-455). Apply that test to this case. Could the appellant have prosecuted this suit on the theory that there was no sale, and at the same time have proceeded against the bankrupt upon the theory that the $30,000. received by him was a part of his estate wrongfully withheld from the complainant? Two proceedings more plainly inconsistent it would be difficult to imagine. The claim put forth in the one would be destructive of that asserted in the other. If the attempted sale was a nullity, on what ground could the money paid by the defendant be a part

of the bankrupt's estate? And on the other hand, if the money paid by the bankrupt and withheld by him was a part of his estate, how could the thing for which this money had been paid belong to that estate? As the complainant could not be entitled to both the thing transferred and the price paid, he had to decide what it was that he would claim as the estate. Was it the accounts? or was it the proceeds of the sale? He had to choose one or the other, and it was this deliberate choice between two inconsistent rights that made the election.

And at the time that the proceeding against the bankrupt was commenced, the appellant had good reason to affirm the transfers. The appellee had advanced $30,000. in cash on accounts amounting to $45,000., that is to say, 66 2/3 per cent. of their face value; and as appears by his answer, he has never been able to collect more than $31,548.35 thereon. Now, the appellant might have seen that some of the accounts were uncollectible, and that others could be collected only with difficulty and expense, and in his eyes, at that time, the $30,000. cash might have looked like a better asset than the accounts. And very likely he would have been quite content with his choice, if the proceeding against the bankrupt had resulted in obtaining more of the money. But while the fact that the bankrupt had squandered or successfully concealed the money might be good ground for putting him in jail, it affords the appellant no reason for changing his position and disaffirming a transfer that he had previously affirmed.

Counsel for the appellant quote from *Bowditch v. Page* (153 N. Y. 104). But they do not give the context. Had they done this, it would readily be seen that the language of the court, considered in the light of the facts before the Court, is not fair-

ly susceptible of the construction that counsel would put upon it. The case was an action for conversion brought by the assignee for the benefit of the creditors of M. & L. Allison, against a bank and the sheriff for taking certain goods under an execution against Isaac Allison, who had been the original owner of the goods, and had given a mortgage thereon to M. & L. Allison, and had delivered possession of the goods to the assignee. The latter had previously obtained a judgment against Isaac Allison and under that judgment had caused *the interest of Isaac Allison* in the goods—whatever that interest might have been—to be sold. The court held that this was not an election, since the sale was only of his interest, and, at most, operated as a foreclosure of his possible equity in the property. The intimation, then, that the assignee was not in a position to elect was merely *obiter*. But it will be noticed that the judge writing the opinion had in mind no such case as the present. He was speaking of different remedies intended to reach the *same property*, and of an election which would work a forfeiture of the vested interests of the beneficiaries in the very same property that he had tried to reach by another proceeding. But cases of that sort are very different from those where a trustee has a choice, not merely between remedies, but between properties; between the thing sold and the price.

Moreover, it is well settled that persons acting in a fiduciary capacity may be bound by their election between inconsistent remedies. Thus an executor may be bound by his election (*Fowler v. Bowery Savings Bank*, 113 N. Y., 450) or a receiver (*Fitts v. Beardsley*, 8 N. Y. Supp., 567) or an assignee for the benefit of creditors (Butler *v.* Hildreth, 9 Metc., 49).

Counsel for the appellant say that it was the appellant's duty to get in the estate. Well, that is conceded. But in discharging that duty, he had to decide what it was that constituted the estate, or, at least, what it was that he would claim as the estate. He could demand the money from the bankrupt, or the accounts from the appellee, but the claim that the money constituted assets was inconsistent with any assertion of title to the accounts. If the sale was in fact fraudulent, the appellant had the right to treat it as a nullity, and claim the accounts themselves as a part of the estate; but when he showed to the court that the sale had been made, and demanded the proceeds as assets of the estate, he necessarily affirmed the sale.

Counsel for appellant also urge that the decision of the Circuit Court of Appeals will embarrass trustees in bankruptcy in their efforts to collect the assets of the estate. But how can this be? The decision amounts to no more than this—that where a trustee, with full knowledge of all the facts, institutes and prosecutes to judgment a proceeding to reach the consideration paid a bankrupt for a transfer of property, he may not afterwards disaffirm the sale and recover the thing for which this consideration was paid. This is the rule that applies to everybody else who is *sui juris*, and the appointment of a man as trustee in bankruptcy hardly places him apart from all other men to be exempt from rules of law to which the rest of the world is required to conform.

It must be obvious that the rule for which the appellant contends would work great hardships. The creditors have rights and equities, it is true, but so have other persons. Where a man has purchased goods from one who afterwards fails, is he never to be secure in his position? May the trustee

consume months or years in an attempt to collect the proceeds from the bankrupt, and then, having failed in this because those proceeds have been lost or squandered by the bankrupt, turn about and attempt to disaffirm the sale? If this were the rule, no one who had bought goods of a bankrupt could know where he stood until the bankruptcy proceedings should be terminated, and the trustee discharged. It might be very convenient for the creditors that a trustee or assignee could both approbate and reprobate, but such a rule would be very hard upon everybody else.

III.

The judgment should be affirmed.

JOHN J. CRAWFORD,
Counsel for Appellee.